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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

January Term

UNITED STATES OF AMERICA
Appellee

vs.

JAMES MALCOLM HENRY
Appellant

On Petition for Writ of Certiorari from the
Sixth Circuit Court of Appeals No: 81-5543

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHETHER OBTAINING A SUPERSEDING INDICTMENT AFTER A DEFENDANT ASSERTS HIS RIGHT TO TRIAL BY JURY CONSTITUTES PROSECUTORIAL VINDICTIVENESS IN VIOLATION OF DUE PROCESS.

A LIST OF PARTIES TO PROCEEDINGS

JAMES MALCOLM HENRY, Appellant.

DALE M. QUILLEN, Counsel for appellant, Suite 208, Cavalier Building, 95 White Bridge Road, Nashville, Tennessee 37205.

UNITED STATES OF AMERICA, Appellee, represented by Joe B. Brown, United States Attorney, 879 U.S. Courthouse, Nashville, Tennessee 37203.

SOLICITOR GENERAL FOR THE UNITED STATES, Department of Justice, Washington, D.C.

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REFERENCE TO UNOFFICAL REPORT OF OPINION BELOW

The defendant's conviction was affirmed by the United States Court of Appeals for the Sixth Circuit in Case No: 81-5543 by Opinion entered by Order of the Court filed April 15, 1982, and incorporated in the Appendix to the Petition for Writ of Certiorari.

STATEMENT OF JURISDICTION

On April 15, 1982, the United States Court of Appeals for the Sixth Circuit entered an Order affirming the conviction of James M. Henry in the District Court for the Middle District of Tennessee for possession of a firearm by a felon in violation of 18 U.S.C. Sections 1202(a)(1) and 922(h)(1). A Petition to Rehear was filed and denied by Order entered on May 19, 1982. The appellant seeks by Writ of Certiorari review in the Supreme Court pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitution of the United States, Amendment 5

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment for indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual

service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Title 18 United States Code §922(h)(1)

"(h) It shall be unlawful for any person—
(1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

* * *

to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

Title 18 United States Code Appendix §1202 (a)(1)

"Any person who—
(1) has been convicted by a court of the United States or of a state or any political subdivision theorof of a felony

* * *

and who receives, possesses or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both."

STATEMENT OF THE CASE

James Malcolm Henry was indicted by the Grand Jury for the United States District Court of the Middle District of Tennessee for possession of a .38 caliber revolver in violation of 18 U.S.C. Section 1202(a)(1). The original indictment filed on February 5, 1981, included a second count alleging the same facts but further alleging a violation of 18 U.S.C. Section 922(h)(1).

During plea negotiations the Assistant United States Attorney for the Middle District of Tennessee, offered to dismiss the second count of the indictment in exchange for a guilty plea to count one. The defendant rejected the plea bargain and the prosecuting attorney obtained a superseding indictment which amended the second count to charge that in addition to having previously been convicted of a felony in the United States District Court for the Middle District of Tennessee, the defendant at the time of the alleged offense was under indictment for a felony in the United States District Court in the Northern District of Georgia.

The defendant was tried on June 1 and 2, 1981. Proof at the trial showed that James Malcolm Henry borrowed a car and traveled with David Trotter from Atlanta, Georgia to Henry's parents' home in McEwen, Tennessee for the July 4, 1980, weekend. Trotter planned to do some target shooting and James Malcolm Henry asked his father, Reverend Sidney Henry, for permission to borrow a pistol. Either Henry or Trotter retrieved the pistol from Rev. Henry, and Trotter took the pistol outside, firing a few times at a tin plate behind the Henry house.

Sometime later James Malcolm Henry's boyhood friend, Sam Chambers, came by the house. James

Malcolm Henry introduced his friend, David Trotter, to Chambers and the three men stood around Chamber's truck engaged in conversation. Chambers invited the men to meet his family at the county baseball park in Waverly and to accompany him him for a barbecue after the ball game. Chambers drove off with Reverend Henry's gun on the front seat. Trotter and Henry went to the baseball game, but Trotter became bored and took the automobile to Waverly where he was involved in a minor traffic accident. Trotter could not satisfy the officer about the car registration, for it had been borrowed from a friend in Atlanta. He brought the officers to the ball field to talk to James Malcolm Henry. The officers, who personally knew Henry, asked him to accompany them to the local police station to clear up the question of ownership of the automobile. Henry agreed, but remembered that there was a pistol in the front of the truck. He walked to the truck, pulled the pistol from the front seat and walked to the rear of the truck where he attempted to hand the pistol to Mrs. Chambers. Officers observed Henry with the pistol and arrested him.

At trial Henry's previous felony conviction was stipulated. Over the objections of defense counsel the government preceded to prove that at the time of his arrest Henry was also under indictment in the Northern District of Georgia.

The defendant was found guilty and sentenced to serve one year. An appeal was taken to the United States Court of Appeals for the Sixth Circuit. The Court of Appeals affirmed the defendant's conviction by Order entered April 15, 1982. A Motion to Rehear was denied by Order of May 19, 1982.

By Petition for Writ of Certiorari pursuant to 28 U.S.C. §1254(1), the defendant seeks review of the judgment of the Court of Appeals affirming his conviction.

ARGUMENT

I.

WHETHER OBTAINING A SUPERSEDING INDICTMENT AFTER A DEFENDANT ASSERTS HIS RIGHT TO TRIAL BY JURY CONSTITUTES PROSECUTORIAL VINDICTIVENESS IN VIOLATION OF DUE PROCESS.

The defendant-appellant would show the Court that the decision of the Court of Appeals affirming his conviction ignores Fifth Amendment's requirements of due process as set forth in **North Carolina v. Pearce**, 395 U.S. 711 (1969) and **Blackledge v. Perry**, 417 U.S. 21 (1974). Following the Supreme Court's decision in **Bordenkircher v. Hayes**, 434 U.S. 357 (1978), the Circuit Courts of Appeal have been unable to reconcile the requirements of due process set forth in **North Carolina v. Pearce, supra,** and its progeny and the narrow decision of **Bordenkircher v. Hayes.** This confusion and concomitant lack of a uniform standard necessary for the fair administration of justice requires exercise of this Court's supervisory authority.

In the instant case the District Court denied the defendant's Motion to Dismiss the superseding indictment without a finding of fact that there was a reasonable explanation for the government's action; no reasonable explanation was produced by the government. Thus, the Sixth Circuit Court of Appeals placed on the defendant the burden of showing actual vindictiveness on the part of the prosecutor where an indictment is augmented after a defendant asserts his right to trial by jury.

Following the decision of **Bordenkircher v. Hayes,** the Sixth Court Court of Appeals had held that the

standard for determining prosecutorial vindictiveness is whether there is a realistic likelihood of vindictiveness for the prosecutor's augumentation of the charge. **United States v. Andrews,** 633 F.2d 449 (6th Cir. 1980). That case recognizes that vindictive conduct is unacceptable and requires control even though prosecutors have and need broad discretion to file charges when there is probable cause someone has broken the law.

However, in applying that standard in the instant case, the Sixth Circuit Court has not looked to the course of action of the government's agent as required by **Chaffin v. Stynchecombe,** 417 U.S. 17 (1973) but has required the defendant to show actual vindictiveness.

During plea negotiations the Assistant United States Attorney told defense counsel that he would present to the grand jury a superseding indictment charging the defendant with possession of a second gun. The defendant rejected the government's offer and asserted his right to trial by jury. The defendant acted on the statements of the prosecutor because of his knowledge and belief that there was no connection between himself and the second gun. The government could not connect the defendant but obtained a superseding indictment amending the existing charge to allege that the defendant was also under indictment in the Northern District of Georgia.

The course of action pursued by the prosecuting attorney is marked by bad faith and exemplifies pursuit of a course of action whose objective is to penalize the defendant's reliance on his constitutional right to trial by jury. The holding of **Bordenkircher v. Hayes** is inapposite to the case at bar. The Sixth Circuit Court of Appeals, applying that case despite its limited holding, failed to consider

the entire course of action of the government's agent in determining the likelihood of vindictiveness.

The Supreme Court in **Bordenkircher v. Hayes**, 434 U.S. 357 (1978), considering a narrow fact situation, held that prosecutor's which

> "...no more than openly presented the defendant with the unpleasant alternatives of foregoing trial or facing charges on which he was plainly subject to prosecution, did not violate the due process clause of the Fourteenth Amendment."

In the instant case, however, the defendant was not openly presented with the intent of the prosecutor. In **Chaffin v. Stynchecombe**, 417 U.S. 17 (1973) the Supreme Court held that it is patently unconstitutional for an agent of the state to pursue a course of action whose objective is to penalize a person's reliance on his legal rights.

Therefore, the Court must assess the course of action of the prosecutor to determine whether the actions of the Assistant United States Attorney in the instant case constituted impermissible vindictiveness. The Circuit Courts of Appeal have not formulated a uniform standard for determination of prosecutorial vindictiveness in filing a superseding indictment.

In reaching its determination in the instant case, The Sixth Circuit Court of Appeals has apparently held that the action of the government is not sufficient to place on the government the burden of demonstrating the absence of vindictiveness. Thus, it has followed the Fifth Circuit holding in **United States v. Ruppell**, 666 F.2d 261 (1981), that the election of a right to stand trial by jury is not sufficient to place on the prosecutor the burden of demonstrating an absence of vindictiveness.

Other circuits have placed the burden on the gov-

ernment to justify its action. In **United States v. Motley**, 655 F.2d 186 (9th Cir. 1981) the Ninth Circuit Court held that a decision to reindict or to reformulate charges to increase the chance of conviction gave rise to an appearance of vindictiveness. The proof in that case refuted the presumption of vindictiveness.

See also, United States v. Ruesga-Martinez, 534 F.2d 1367 (9th Cir. 1976) holding that when a prosecutor reindicts an accused because of the exercise of a procedural right **the prosecution** bears the heavy burden of proving that the increase is not motivated by a vindictive motive. This approach is adopted by the Circuit Court for the D.C. Circuit, the Fourth Circuit and the First Circuit Courts of Appeal. The Court of Appeals for the D.C. Circuit has held that the prosecution must justify harsher treatment in a way which negates the possibility of vindictiveness. **United States v. Jamison**, 505 F.2d 407 (D.C. Cir. 1974).

Likewise, the Fourth Circuit Court of Appeals requires a showing not of actual vindictiveness but of a genuine risk of retaliation, and, in **U.S. v. Goodwin**, 637 F.2d 250 (4th Cir. 1981) that Court held that reindictment after election to be tried by a jury presented a genuine risk of retaliation and was impermissible. **See also, Koski v. Samaha**, 648 F.2d 790 (1st Cir. 1981).

The government's unilateral imposition of a penalty on a defendant who has chosen to exercise a legal right is impermissible. As this Court stated in **North Carolina v. Pearce**, 395 U.S. 711 (1969).

> "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort."

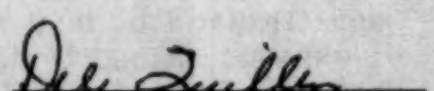
The Court of Appeals for the Sixth Circuit has ig-

nored in the instant case the major evil which the above cited cases seek to overcome, i.e. indictment on more severe or numerous charges after the exercise of a constitutional or statutory right. **Lovett v. Butterworth**, 610 F.2d 1002 (1st Cir. 1979); **Miracle v. Estelle**, 592 F.2d 1269 (5th Cir. 1979); **United States v. Burt**, 619 F.2d 831 (9th Cir. 1980).

After the defendant's election of his right to stand trial by a jury the prosecutor followed a course of action whose objective was to penalize the defendant's reliance on his legal rights. This course of conduct raises a presumption of vindictiveness, for unlike the facts presented in **Bordenkircher v. Hayes**, the defendant in the instant case was not openly presented with the intent of the prosecutor to seek an increased charge from the outset of the plea negotiations. The Sixth Circuit Court of Appeals errs in placing on the defendant the burden of proving actual vindictiveness.

CERTIFICATE OF SERVICE

I certify that I have forwarded a copy of the foregoing Petition for Writ of Certiorari to Mr. Joe B. Brown, U.S. Attorney, 879 U.S. Courthouse, 800 Broadway, Nashville, Tennessee 37203, and the Solicitor General of the United States, Department of Justice, Washington, D.C. 20530, this 30th day of June, 1982.



Dale Quillen

APPENDIX

No. 81-5543
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JAMES M. HENRY,
Defendant-Appellant.

Before: BROWN and KENNEDY, Circuit Judges; and CECIL, Senior Circuit Judge

Defendant-appellant appeals his conviction for possession of a firearm by a felon in violation of 18 U.S.C. §§1202(a)(1) and 922(h)(1). He alleges that the government's amendment of the indictment was improper and that the admission of certain evidence was improper and prejudicial. For the reasons stated herein, we reject appellant's claims and affirm his conviction.

Defendant Henry and his friend Trotter were visiting defendant's family in Tennessee. During the day Henry and Trotter engaged in target practice with a gun borrowed from defendant's father. An old boyhood friend of defendant's, one Chambers, stopped by and invited Henry and Trotter to a ballgame. Trotter soon tired of the game and went to have the car washed. On the way he had a car accident. The policemen investigating the accident returned with Trotter to the ballpark to speak with Henry. Henry agreed to accompany them to the police station but indicated that the first had to speak with Chambers. He walked right past Chambers

and went to Chambers' truck. There the police officers testified they saw the defendant lift something from under his shirt and place it in the truck. This object, it may be inferred, was the gun for possession of which defendant was charged. Henry testified that he was merely retrieving the gun from Chambers' truck's front seat, where it had accidentally been placed during Chambers' visit to the Henry household. Henry claimed he wanted to make sure the gun would be returned to his father. Mrs. Chambers testified that she did not remember seeing the gun in the truck on the way to the ballpark, although she and several of her children had ridden in the front seat.

In the first indictment, the defendant was charged with the violation of the aforementioned statutes. The prosecutor offered to drop the count alleging violation of § 922(h)(1) in return for a guilty plea on the other count. The defendant refused. After this refusal, the prosecutor received a certified copy of an indictment pending against the defendant in Georgia. The prosecutor then had issued a superseding indictment which repeated the charges in the first indictment but added the additional fact of the Georgia indictment. No evidence was admitted during trial on the substance of the Georgia indictment.

The defendant claims that the superseding indictment was motivated by his refusal to plea bargain. The government claims that it amended the indictment to ensure that the jury did not exonerate the defendant simply because his previous felony conviction was over ten years old.

It is clear that the superseding indictment does not change the offense for which defendant was charged nor the potential penalty upon conviction. The new indictment merely increased the govern-

ment's chances of conviction by adding another factual element to the case. In **Bordenkircher v. Hayes,** 434 U.S. 357 (1978), the Supreme Court ruled that there was no violation of due process when the prosecutor brought more serious charges after the defendant refused the proffered plea bargain. The Court made clear that the threat of reindictment was relevant to due process only if the new charge "brought an additional and more serious charge...." **Id.** at 360. Here the charge in the superseding indictment was identical; only an additional factual element was added. "*[I]*n the 'give-and-take' of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer." **Id.** at 363. **See also United States v. Andrews,** 633 F.2d 449, 453 (6th Cir. 1980) (en banc). **cert. denied.** 450 U.S. 927 (1981) (prosecutorial vindictiveness relevant only where there is an "augmentation of the charges" by the prosecutor); **United States v. Motley,** 655 F.2d 186 (9th Cir. 1981) (prosecutor's decision to reformulate the charges after mistrial, to increase the chance of conviction without increasing the potential severity of the charges, was proper). Even if some prosecutorial vindictiveness could be found from the facts of this case, the prosecution has rebutted it by showing a justification for the indictment change. **Andrews, supra,** at 456 n. 10.

Defendant also claims that the court admitted certain evidence as constituting prior bad acts in violation of Fed. R. Evid. 404(b). These "bad acts" included testimony correctly identifying defendant's name which defendant had legally changed prior to trial, evidence indicating that at the time of his arrest defendant was carrying $2000 in cash, and testimony which indicated that defendant had lied

to his father about the amount of money which he was carrying. Defendant's claims are meritless.

The testimony concerning the $2000, even if that could be considered a "bad act," was relevant to provide a motive for the defendant's possession of the gun. It served to rebut the defendant's claim of innocent possession. Similarly, the brief reference to defendant's name change was neither a bad act or prejudicial to defendant. Certainly, the prosecution has the right to inform the jury as to the defendant's proper name. Finally, the evidence concerning defendant's misstatements to his father serve to undermine the defendant's credibility and credibility was crucial to the jury's evaluation of the defendant's defense.

Accordingly, the defendant's conviction is affirmed.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman, Clerk

John P. Hehman, Clerk

No. 81-5543

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JAMES M. HENRY,
Defendant-Appellant.

/

Before: BROWN and KENNEDY, Circuit Judges; and CECIL, Senior Circuit Judge.

Upon consideration of the petition for rehearing filed herein by the appellant, the Court concludes that all of the questions addressed in the petition for rehearing were fully considered upon the original submission and decision of this case.

It is therefore ORDERED that the petition for rehearing be and it hereby is DENIED.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman, Clerk

John P. Hehman, Clerk